No. 84-1279

In The Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,
Petitioner,

v.

ROBERT E. VAN ARSDALL,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. The automatic reversal rule adopted by the court court below is not supported by either constitutional policy or prior precedent.

Regardless of where one chooses to place the joint between error and remedy, the Confrontation Clause does not compel an appellate court to reverse a defendant's conviction for an erroneous preclusion of impeachment cross-examination unless, in a two-step inquiry, the court concludes: (1) that there is a reasonable likelihood that the precluded impeachment could have affected the jury's evaluation of the witness' credibility; and (2) if so, that there is a reasonable possibility that the not fully impeached testimony of the witness could have contributed to the guilty verdict. Pet. Br. at 29. In contrast, the court

below held that the Sixth Amendment not only enjoins an appellate court from undertaking the second step, but directs reversal without consideration of the prejudicial effect of the error. The issue in this case is which of these conflicting views accurately reflects the command of the Confrontation Clause.[1]

Except for arguing that the considerable harshness of the remedy adopted below is mitigated to some degree by its purportedly narrow applicability (Resp. Br. at 20-25), Van Arsdall offers little foundation, in either policy or precedent, to support the Delaware court's automatic reversal rule.[2] First, it is hard to discern any policy rationale for the rule. As in this case, if the error involves a restriction or limitation on the cross-examination of an in-court witness, the core value of the Confrontation Clause —a prohibition against prosecutions based on *ex parte* affidavits, procured from anonymous or available, but absent, accusers—[3] has not been seriously implicated. Admittedly, a trial court's procedural ruling that precludes all cross-examination of every prosecution witness, *see, e.g., Brookhart v. Janis*, 384 U.S. 1 (1966), may call forth an automatic reversal rule either because such a trial close-

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[1]Although the Ninth Circuit had previously expressed some support for a rule of automatic reversal (Brief for the United States as Amicus at 14 n.15), it has recently found a Confrontation Clause cross-examination error harmless, utilizing an analysis mirroring the appropriate two-level inquiry. *United States v. Monks*, 774 F.2d 945, 953-54 (9th Cir. 1985).

[2]Indeed, he concedes that the rule is overly broad since he agrees that there are situations where a trial court's total prohibition of a particular line of impeachment evidence may be considered harmless. Resp. Br. at 28, 31.

[3]*California v. Green*, 399 U.S. 149, 156-57 (1970); *id.* at 179 (Harlan, J., concurring).

ly parallels prosecution by *ex parte* affidavit or because the magnitude of the error makes its effect "inherently indeterminate." *Chapman v. California*, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting). Those concerns simply are not present when, as here, the error involves not a structural alteration of the trial process, but a mistaken restriction on the extent of cross-examination of one otherwise cross-examined witness. In that case, the error is evidentiary, not structural; its effect can be isolated and traced. It is that type of error—relating to how evidence was presented to the fact-finder—that the courts have traditionally found amenable to case specific analysis for harmlessness or prejudicial impact.[4] No policy reason supports the Delaware court's conclusion that the federal constitution mandates reversal for an isolated evidentiary error.[5]

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[4]This dichotomy is reflected in the decisions of this Court identifying the appropriate remedy for errors involving the right to counsel. Where the government has committed the structural error of failing to provide counsel at trial, automatic reversal is appropriate. *Chapman*, 386 U.S. at 23 & n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). However, where the error manifests itself in the admission of evidence procured by the prosecution, prior to trial in the absence of constitutionally required counsel, the evidentiary error has been held subject to case-specific scrutiny for harmlessness. *See, e.g., Moore v. Illinois*, 434 U.S. 220, 222 (1977); *Milton v. Wainwright*, 407 U.S. 371, 372 (1972). *See generally Rushen v. Spain*, 464 U.S. 114, 128 n.8 (1983) (Stevens, J., concurring) (recognizing structural/evidentiary distinction in determining appropriate remedy for constitutional error).

[5]Respondents also suggest that the automatic reversal rule is mandated because appellate courts are functionally incapable of meaningfully measuring the extent and impact of excluded impeachment evidence. Resp. Br. at 31. But this Court has expressly rejected such a suggestion, *United States v. Bagley*, 105 S.Ct. 3375 (1985), and even the court below refused to embrace it. *See* Pet. App. A-6 (if sufficient cross-examination permitted, appellate court must determine the harmlessness of any additional impeachment evidence which the trial court excluded).

Moreover, Van Arsdall's efforts to pull support for the lower court's rule from the precedents of this Court are unavailing. Initially, this Court's decision in *Alford v. United States,* 282 U.S. 687 (1931), relied upon by the Respondent (Resp. Br. at 21-22), is consistent with the two-step inquiry Petitioner believes the Confrontation Clause requires before a conviction may be reversed. In *Alford,* the trial court had abruptly precluded any cross-examination concerning a witness' address and business and had refused to alter its ruling, even after the defendant proffered that the purpose of the inquiry was to suggest bias by showing that the witness was being held in federal custody. When this Court concluded that the trial court erred when it "cut off *in limine* all inquiry on a subject to which the defense was entitled to a reasonable cross-examination," *id.* at 694, it did no more than rule that given the rudimentary nature of the inquiry and because the trial court's ruling had prevented the development of a record, it would presume that there was a reasonable likelihood that the excluded impeachment would have affected the jury's assessment of the witness' credibility.[6]

But this Court's ultimate conclusion that the error was prejudicial, so as to mandate reversal, came only after it performed the other inquiry of assaying the material significance of the witness' direct, and not fully impeached,

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[6]Because the heart of this dispute centers on whether the Delaware court was correct in its conclusion that the Confrontation Clause prohibits any inquiry into the harmlessness of the witness' unimpeached direct testimony, this Court need not decide whether this same presumption would be applied in Respondent's case, where the trial judge, out of the presence of the jury, allowed the defense to explore the subject and develop a record for appellate review.

testimony. *Id.* at 688, 692 (witness gave "damaging testimony with respect to various transactions of the accused" including "uncorroborated conversations of the defendant of a damaging character"). *Alford* does not support the action of the court below.

Nor, as Respondent urges, can *Harrington v. California,* 395 U.S. 250 (1969) be so easily dispatched on the basis that it involved the erroneous admission of testimony while cross-examination errors, as in *Davis v. Alaska,* 415 U.S. 308 (1974) and here, involve the exclusion of evidence. Resp. Br. at 27-30. In both situations, the constitutional violation is identical: a witness offering testimony favorable to the prosecution has been rendered unavailable for cross-examination. In *Harrington,* the unavailability was caused by the prosecutor's judicially sanctioned decision to join, in the interest of judicial economy, the prosecution of co-defendants; in *Davis* and here, the unavailability was caused by the trial judge's decision sustaining an evidentiary objection lodged by the prosecutor. In both cases, the result of the unavailability is the same: the trier of fact was exposed to evidence from a witness where the defendant has not been able to show its potential unreliability.[7] In either case, if that evidence, erroneously immunized from challenge, played no significant role in

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[7]*Harrington*'s focus on the impact of the witness' unimpeached testimony was nothing more than an application of the historical procedural principle that if further cross-examination of an in-court witness is precluded by his death, incapacity, or assertion of a valid testimonial privilege, the appropriate procedure is to strike his direct testimony. *United States v. Cardillo,* 316 F.2d 606, 613 (2nd Cir.), *cert. denied,* 375 U.S. 822 (1963). *See generally* E. Cleary, *McCormick on Evidence* § 19 at 48 (3rd ed. 1984).

the jury's determination of guilt, the appellate court is not compelled to reverse.

B. Fleetwood's testimony did not materially contribute to the jury's guilty verdicts.

Though not denying that almost every detail observed by Fleetwood during his momentary glimpse into Pregent's apartment dovetailed with his own recitation of the events prior to midnight (*see* Pet. Br. at App. 1-2), Van Arsdall argues that Fleetwood's testimony was significant. According to him, the prosecutor used Fleetwood's testimony during his cross-examination of Van Arsdall to suggest that Van Arsdall's appearance in Fleetwood's apartment after the murder was for the purpose of killing a witness who had seen him in Pregent's apartment prior to the murder. Resp. Br. at 4-5 & n.8. Then, the prosecutor supposedly offered to the jury that inference to rebut the defense argument that Van Arsdall's decision to go to Fleetwood's apartment, instead of fleeing from the scene of the crime, showed his innocence. Resp. Br. at 16-17, 44-45. Thus, the argument seems to run, even if the Delaware court wrongly applied a remedy of automatic reversal, this Court should affirm the decision because the restriction on cross-examination was harmful. The record makes his theory a mirage.

During his cross-examination of the respondent, the prosecutor never referred to Fleetwood's testimony.[8] Tr.

[8]Fleetwood had testified that his momentary and limited observation of Van Arsdall, Pregent, and the victim occurred when he, without any exchange of conversation, merely poked his head into Pregent's open doorway. Tr. III49-52 (Fleetwood) (JA 82-85). He never testified that anyone in the apartment saw him.

X70-89 (Van Arsdall). When he asked Van Arsdall why he went across the hall to Fleetwood's apartment, that inquiry was precipitated, not by any recall of Fleetwood's testimony, but by Van Arsdall's own response a few seconds earlier that "[a]ll I know, Fleetwood was across there." Tr. X78-79 (Van Arsdall) (JA166-67). During the entire cross-examination, the prosecutor never mentioned that Van Arsdall had sought to kill Fleetwood because he was a witness. If anything, his short inquiry of Van Arsdall, particularly as he pressed him concerning whether others were in Fleetwood's apartment, Tr. X78 (Van Arsdall) (JA166-67), was intended to suggest not that Van Arsdall sought to silence Fleetwood, but that he may have been on a homicidal rampage, bent on killing all the occupants.[9]

In addition, the prosecutor never offered to the jury an explanation of Van Arsdall's conduct based on Fleetwood's testimony. When in rebuttal summation, he responded to Van Arsdall's argument that the post-murder conduct suggested innocence, the prosecutor never mentioned Fleetwood or his testimony. Moreover, he never intimated that Van Arsdall's purpose was to kill a potential eyewitness. Rather, his only rejoinder was that, like the killing of Epps, Van Arsdall's subsequent actions were senseless and beyond explanation. Tr. XI115-16 (Reed) (JA 201-02).

Distilled to its essence, Van Arsdall's proffer of prejudice is nothing more than speculation that, unaided

[9]Ironically, while stating that he knew Fleetwood was in his apartment, based on an earlier visit to the party, Van Arsdall during cross-examination denied that he was aware of the presence of others. However, during his direct examination, he had testified that he saw numerous other people there during his early evening visit. Tr. X33-35 (Van Arsdall).

by anything voiced by the prosecutor, the jury may have forged and utilized the tenuous inference he has now constructed from a single question. But the federal harmless error standard announced in *Chapman v. California,* 386 U.S. 18, 24 (1967), dictates reversal only where there is a reasonable possibility, not just any possibility, that the error affected the judgment. *Chapman*'s test is not whether one can imagine any scenario where the error may have affected a juror; rather, harmlessness must be judged by what seems to be the probable impact of the error on the minds of the average jury. *Harrington v. California,* 395 U.S. 250, 254 (1969). *See also Schneble v. Florida,* 405 U.S. 427, 432 (1972). Van Arsdall's theory does not meet that standard.

Given the nature of Van Arsdall's defense and his own testimonial concessions, Fleetwood's testimony quickly faded into insignificance. Pet. Br. at 7-15, 35-39. Unless this Court is now willing to require harmlessness to be shown to a degree of certainty not required of even the trier of fact, Respondent's attempts, however valiant, to counter that conclusion are unavailing.[10]

C. The judgment below was based on federal, not independent state law grounds.

Resurrecting an argument relegated to a footnote in his brief opposing the petition for writ of certiorari, Resp.

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[10]In this case, Respondent suggests that given the unresolved question about the propriety of excluding evidence concerning the Blake homicide, any finding of harmlessness may only be advisory. Resp. Br. at 10 n.17. However, Fleetwood's testimony was insignificant because it offered nothing beyond what Van Arsdall himself had conceded. That conclusion would survive even if the court below on remand would find that the inquiry about the Blake homicide was also erroneously prohibited.

Br. Opp. at 18 n. 23, Van Arsdall asserts that this Court should dismiss this case because the automatic reversal rule is based on an independent state law ground. He argues that it was adopted, not as an interpretation of federal constitutional law under *Davis v. Alaska,* 415 U.S. 308 (1974), but as a prophylactic device, announced under the state appellate court's "superintending" authority, to coerce supposedly unmindful and intransigent trial judges to permit liberal cross-examination. Resp. Br. at 37-44.[11]

Even if one accepts as plausible the conclusion that three appellate reversals over a five year period would trigger such a response, the language of the opinion below belies any finding that the court was acting on such an independent state law ground.[12] Though sprinkled liberally with references to the Confrontation Clause and *Davis,* the opinion is devoid of any clear statement indicating that the court was foreclosing federal review by looking to Delaware law as the basis for its decision. *Caldwell v. Mis-*

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[11]Respondent also seems to suggest the decision is unreviewable because the appropriate remedy for federal constitutional error occurring during a state criminal trial is "inherently" a question of state, rather than federal, law. Resp. Br. at 43. In *Chapman v. California,* 386 U.S. 18, 20-21 (1967), this Court rejected that hypothesis, recognizing that the duty to decide whether a right guaranteed by the federal constitution has been denied necessarily encompasses the responsibility to determine, as a matter of federal law, the consequences which flow from a denial of that right. *See also Connecticut v. Johnson,* 460 U.S. 73, 90-91 (1983) (Powell, J., dissenting); *Oregon v. Hass,* 420 U.S. 714, 719 & n.4 (1975).

[12]While the decision below refers to the parallel state Confrontation guarantee, Del. Const. Art. I, § 7 (1897) (Pet. App. at A-4), Van Arsdall does not contend that the automatic reversal rule was seen by the Delaware court as a remedy mandated by the state constitution. Indeed, that court has construed

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sissippi, 105 S.Ct. 2633, 2638-39 (1985); *California v. Carney,* 105 S.Ct. 2066, 2068 n.1 (1985); *Ohio v. Johnson,* 104 S.Ct. 2536, 2540 n.7 (1984); *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983). Indeed, state law is barely mentioned. One searches in vain for a single reference to either the state harmless error rule, Del. Super. Ct. Crim. R. 52(a), or the invocation of any "superintending" authority. Not a single word chastises the trial judge personally, or the trial courts generally, for supposed continued errors which in Van Arsdall's view compelled the state court to impose the drastic remedy of automatic reversal. Instead, after emphasizing that " 'the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless,' " Pet. App. at A-6 (quoting *Weber v. State,* 457 A.2d 674, 683 (Del. 1983)), the court looks to a federal jurisdiction, the District of Columbia, for a test of harmless error "consistent with *Davis.*" Pet. App. at A-6 to A-7. Any fair reading indicates that the Delaware court was attempting to divine federal law.

Finally, it is now somewhat disingenuous for the Respondent to urge a non-federal foundation for the decision below. The portion of the opinion below articulating the rule of automatic reversal (Pet. App. at A-6 to A-7) repeats, almost verbatim, a portion of his brief to the Delaware Supreme Court. Reply Brief for Appellant (Van

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(Continued from previous page)

the state constitutional provision as mandating the same requirement of an opportunity for cross-examination as the Sixth Amendment. *Ward v. State,* 395 A.2d 367, 368-69 (Del. 1978). *Cf. Delaware v. Prouse,* 440 U.S. 648, 652-53 (1979) (state search and seizure provision interpreted consistent with Fourth Amendment).

Arsdall) at 17-18, *Van Arsdall v. State,* 486 A.2d 1 (Del. 1984). There, he specifically argued that *Davis* utilized and mandated a *per se* error test because a denial of the federally secured right of confrontation was an error affecting a fundamental right which always required reversal. *Id.* at 10-11. Having convinced the court below that automatic reversal was the remedy compelled by the federal constitution, he cannot now insulate that rule from scrutiny by invoking a jurisdictional objection created out of whole cloth.

CONCLUSION

For the reasons stated in Petitioner's opening brief and here, the judgment of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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